90-376

Supreme Court, U.S.
FILED
AUG 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

==========

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RICKY WAYNE GORDON

Petitioner

VS.

THE UNITED STATES
OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LAW OFFICES OF GREG GLADDEN
3017 Houston Avenue
P. O. Box 1028
Houston, Texas 77251
713-880-0333

LAW OFFICES OF DON GLADDEN
P. O. Box 50686
Fort Worth, Texas 76105

August 31, 1990

QUESTIONS PRESENTED

1. Under United States v. Leon, 468 U.S. 897 (1984), may the objective reasonableness of an executing officer's belief that a search warrant's description particularly describes a place be established conclusively by an officer's reading of the description, without consideration of information available to officers who would physically execute the warrant and attempt to set foot upon the described premises?

2. When determining whether an "executing officer" could reasonably presume a search warrant's description of a place to be valid, does the exception to the exclusionary rule recognized in United States v. Leon, 468 U.S. 897 (1984) allow consideration of information known to the affiant officer but not disclosed to the issuing magistrate?

LIST OF PARTIES

Ricky Wayne Gordon	Petitioner/Defendant
Greg Gladden	Counsel for Petitioner/Defendant
Don Gladden	Counsel for Petitioner/Defendant
Kathlyn G. Snyder	Assistant United States Attorney
Charley A. Davidson	Assistant United States Attorney

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	3
STATUTES AND RULES INVOLVED	3
STATEMENT OF THE CASE	3

REASONS FOR GRANTING THE WRIT:

I. The Fifth Circuit's decision holding that the objective reasonableness of an officer's execution of a search warrant under United States v. Leon is determined by what an officer would believe after "simply looking" at the warrant completely nullifies the particular description of place requirement of the Fourth Amendment and represents a substantial departure from existing Supreme Court precedent. 8

II. The Fifth Circuit's decision construing United States v. Leon in a manner which allows consideration of information allegedly known to an affiant officer but not disclosed to the issuing magistrate directly conflicts with the decisional law of the United States Court of Appeals for the Ninth Circuit and the Supreme Court of the State of Nebraska. 12

CONCLUSION 17

APPENDIX A A1

APPENDIX B B1

APPENDIX C C1

TABLE OF AUTHORITIES

Cases	Page
Maryland v. Garrison, 480 U.S. 79, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987)	11
State v. Palmar, 231 Neb. 687, 437 N.W.2d 503 (1989)	15
Steele v. United States, 267 U.S. 498, 45 S.Ct. 414, 69 L.Ed.2d 757 (1925)	11,13
United States v. Gordon, 901 F.2d 48 (5th Cir. 1990)	2,5,10
United States v. Hove, 848 F.2d 137 (9th Cir. 1988)	15
United States v. Martin, 833 F.2d 752 (8th Cir. 1987), cert denied, 494 U.S. __, 110 S.Ct. 1793 (U.S. April 2, 1990)(No. 89-6843)	16
United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)	i,iii,iv,7,8,9, 10,12,13,14,15,16
Statutes Codes and Constitutional Provisions:	
Fourth Amendment to the United States Constitution .	throughout
28 U.S.C. Section 1254(1)	3
LaFave, Search and Seizure: A Treatise on the Fourth Amendment, (1987)	14

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO._____

RICKY WAYNE GORDON

Petitioner

VS.

THE UNITED STATES
OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner herein prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to review that Court's April 26, 1990 Judgment and Order in this proceeding.

OPINIONS BELOW

The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit from which review is sought, are reported at 901 F.2d 48 (5th Cir. 1990), and are attached as Appendix A to this Petition.

The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit denying Petitioner's Petition for Panel Rehearing and Suggestion for Rehearing En Banc, are not reported but are attached as Appendix B to this Petition.

The Judgment and Memorandum Opinion of the United States District Court for the Southern District of Texas denying Petitioner's Motion to Suppress, from which Petitioner appealed, are not reported, but are attached as Appendix C to this Petition.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered the Judgment from which review is sought April 26, 1990. Jurisdiction is now conferred upon this Court by 28 U.S.C. Section 1254(1).[1]

STATUTES AND RULES INVOLVED

No particular statutes or rules are involved or need be reviewed for consideration of the substantive issues raised in this Petition.

STATEMENT OF THE CASE

On September 16, 1988, Special Agent Wayne Hoffmann of the Federal Drug Enforcement Administration went with a fellow officer who had been working

---

[1]The time for filing this petiton for writ of certiorari began to run on June 4, 1990, the date of the judgment entered on Petitioner's timely Petition for Rehearing in the Court of Appeals. See Sup.Ct.R. 13.4 (1990).

undercover in an ongoing methamphetamine laboratory investigation, to a location in Harris County, Texas, which the undercover officer suspected to be the site of an illicit drug manufacturing laboratory. Because the area was, in the words of Agent Hoffmann, "a difficult area to find your way in and out of" (R.V,60) the purpose of going to the suspected premises was to familiarize Agent Hoffmann with the suspected lab's location.

The result of Agent Hoffmann's collaboration with the undercover officer was that on September 22, 1988, Agent Hoffmann obtained a warrant to search a premises described in the warrant as being located at "18003 10th Street, Magnolia Gardens, Harris County, Texas." (R.I,84). In the early morning hours of the following day, Agent Hoffmann along

with several other officers searched Petitioner Ricky Gordon's residence located at "18003 Riverside Drive" in Harris County, Texas. In relation to 10th Street, Riverside Drive intersects 10th Street at roughly a 90 degree angle (R.V,75), with the Gordon residence being located several blocks down from that intersection. See App. to Pet. for Cert. ("App."), A4.

Several days after the execution of the warrant, Agent Hoffmann, in the course of a routine tax records check of the premises searched, discovered that he was unable to find a "18003 10th Street" in the "Magnolia Gardens" subdivision of Harris County. (R.V,62-63). Other than the incorrect address, no description of the place intended to be searched appears in the warrant. The warrant does not contain directions to the search location, does not in any way describe

the outward appearance of the dwelling to be searched, and does not provide any other means of locating the place intended. (R.I,84).

On October 19, 1988, Petitioner was named as a defendant in a four count Indictment returned by a Federal Grand Jury sitting in the Southern District of Texas, Houston Division. On November 18, 1988, Petitioner filed a pre-trial motion contending that the search warrant purporting to authorize the search of Petitioner's residence was invalid for its failure to particularly describe the place intended to be searched as required by the Fourth Amendment, and that all evidence derived from the resulting unconstitutional search should therefore be suppressed. (R.II,214). Following a hearing on the Petitioner's Motion to Suppress held April 26, 1989 (R.V,1), the

District Court, the Honorable Kenneth Hoyt, J., presiding, denied Petitioner's motion, and a written order to this effect was subsequently entered on May 8, 1989. (R.I,62).

On appeal to the United States Court of Appeals for the Fifth Circuit the Petitioner renewed his contentions that the search warrant's description was invalid under the particularity clause of the Fourth Amendment; that the scope of the suppression inquiry was limited to information disclosed to the issuing magistrate, or to information which would have been discovered by an executing officer, other than the affiant officer, when attempting to physically execute the warrant; and that based on this information, the exception to the exclusionary rule recognized in United States v. Leon, 468 U.S. 897 (1984) did

not apply. The Court of Appeals, without reaching the question of whether a Fourth Amendment violation had occurred, rejected Petitioner's contentions and ruled the evidence seized in the search of Petitioner's residence admissible under the Leon exception. The instant Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's decision holding that the objective reasonableness of an officer's execution of a search warrant under United States v. Leon is determined by what an officer would believe after "simply looking" at the warrant completely nullifies the particular description of place requirement of the Fourth Amendment and represents a substantial departure from existing Supreme Court precedent.

In its consideration of whether unconstitutionally seized evidence should be excluded in the instant case, the Court of Appeals correctly identified as controlling authority the Supreme Court's

decision in United States v. Leon, 468 U.S. 897 (1984), wherein the Court held that evidence seized in violation of the Fourth Amendment must continue to be suppressed where:

> "A warrant [is] so facially deficient -- i.e., in failing to particularize the place to be searched...that the executing officers cannot reasonably presume it to be valid." Id., 468 U.S. at 923.

In holding that the Government had met its burden of showing that an officer executing the instant warrant could have "presumed it to be valid" under the Leon standard, the Court of Appeals relied on two grounds.[2] As the first ground for its decision, the Court of Appeals ruled that the "facial deficiency" in the description of a search warrant, within

---

[2]The second ground relied upon by the Court of Appeals is addressed by Quesiton Number 2 and the second Reason for Granting the Writ presented herein.

the meaning of the Leon exception, is determined by whether an officer who read the address in the warrant description would have known, without first attempting to execute the warrant, that the address identified in the warrant did not exist. In this connection the Court stated:

> "[O]ne who looked simply at the warrant, or at both the warrant and the supporting affidavit, would not suspect that it was invalid; any defect would appear only if one knew that Tenth Street did not have an "18003" address. It is obvious that such was not common knowledge throughout Harris County. The asserted defect in the warrant was not facial in the sense used in Leon." (App. A8-A9).

The above reasoning of the Court of Appeals seriously overlooks the practical differences between the ability of an executing officer to detect a violation of the probable cause requirement, as opposed to the particular description of

place requirement, merely from the face of a search warrant and affidavit. Although an adequate assessment of probable cause can easily be made by reading a search warrant and its supporting affidavit, such is not the case where the particular description of place requirement is in issue. As the Supreme Court recently observed in Maryland v. Garrison, 480 U.S. 79 (1987):

> "It is only after the police begin to execute the warrant and set foot upon the described premises that they will discover the factual mistake and must reasonably limit their search accordingly." Id., 480 U.S. at 88 n.14.

For at least the last 65 years, the standard for assessing the constitutional particularity of a search warrant's description has inquired into whether "[an] officer with [the] search warrant can, with reasonable effort, ascertain and identify the place intended." Steele

v. United States, 267 U.S. 498, 503 (1925). The Court of Appeals' holding in the present case that an officer's assessment of a warrant's description after "simply looking at it" is determinative of whether an executing officer could "reasonably presume" the warrant to be valid, as intended by the Supreme Court in Leon, is plainly in error and whether intended by the Court of Appeals or not, will obviously operate to render the particularity requirement of the Fourth Amendment to the United States Constitution a dead letter.

II. The Fifth Circuit's decision construing United States v. Leon in a manner which allows consideration of information allegedly known to an affiant officer but not disclosed to the issuing magistrate directly conflicts with the decisional law of the United States Court of Appeals for the Ninth Circuit and the Supreme Court of the State of Nebraska.

In both the District Court and the Court of Appeals the Petitioner argued

that the term "executing officer" in United States v. Leon, 468 U.S. 897, 923 (1984), like the term "the officer with a search warrant" in Steele v. United States, 267 U.S. 498, 503 (1925), operated to limit the scope of the Leon "objective reasonableness" inquiry in the instant case to a wholly objective assessment based solely on information disclosed to the issuing magistrate, or information which would have been discovered by an officer, other than the affiant officer, when attempting to physically execute the warrant and set foot on the described premises. Rejecting Petitioner's contention, the Court of Appeals construed Leon expansively to allow consideration of information allegedly known to the affiant officer which was not disclosed to the issuing magistrate, including the

fact that the affiant officer had personally been to the described premises prior to applying for the warrant; that the affiant officer could locate the location to be searched without reference to the description in the warrant; and that the affiant officer would be personally executing the warrant in question. See App. A10-A11 [Citing La Fave, Search and Seizure: A Treatise on the Fourth Amendment, 215 n.34 (1987)].

The lower federal and state appellate courts are sharply divided over the question of whether the Leon objective reasonableness inquiry allows consideration of facts known to the affiant officer when applying for a warrant but not disclosed to the issuing magistrate. In direct conflict with the reasoning of the Fifth Circuit in the present case, the United States Court of

Appeals for the Ninth Circuit held in United States v. Hove, 848 F.2d 137, 140 (1988) that:

> "Leon does not extend...to allow consideration of facts known only to an officer and not presented to a magistrate. The Leon test for good faith reliance is clearly an objective one and it is based solely on facts presented to the magistrate."

Expressly adopting the foregoing reasoning of the Ninth Circuit in United States v. Hove, the Supreme Court of Nebraska held in State v. Palmar, 231 Neb. 687, 698, 437 N.W.2d 503, 510 (1989) that:

> "[F]acts subjectively relied upon by the affiant but excluded from the affidavit do not establish that an officer acted in objectively reasonable reliance upon a subsequently invalidated warrant."

The United States Court of Appeals for the Eighth Circuit, on the other hand, has ruled that the Leon exception permits

consideration of information known to an affiant officer which was not disclosed to the issuing magistrate. In United States v. Martin, 833 F.2d 752, 755-756 (8th Cir. 1987) the Court held:

> "[W]hen assessing good faith [under Leon] we can and must look to the totality of the circumstances including what [the officer] knew but did not include in his affidavit."

See also id., 833 F.2d at 757 (Lay, C. J., concurring) ("Deciding whether an officer acted in good faith [under Leon] requires an examination of the totality of the circumstances beyond the four corners of the affidavit").

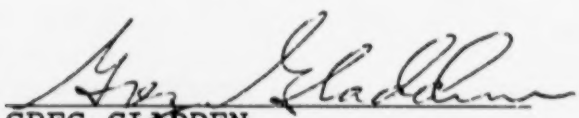
In light of the substantial period of incarceration confronting Petitioner, as well as the clear division of authority on this question critical to the issue of suppression under Leon, Petitioner respectfully submits that his Petition for Writ of Certiorari should be granted

to decide this significant and recurring question.

CONCLUSION

For the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to review the April 26, 1990 Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



GREG GLADDEN
LAW OFFICES OF GREG GLADDEN
3017 Houston Avenue
P. O. Box 1028
Houston, Texas 77251
713-880-0333

LAW OFFICES OF DON GLADDEN
P. O. Box 50686
Fort Worth, Texas 76105

UNITED STATES of America,
Plaintiff-Appellee,

v.

Ricky W. GORDON,
Defendant-Appellant.

No. 89-2889
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

April 26, 1990.

Appeal from the United States District Court for the Southern District of Texas.

Before POLITZ, GARWOOD and JOLLY, Circuit Judges.

OPINION

GARWOOD, Circuit Judge:

Defendant-appellant Ricky W. Gordon (Gordon) appeals his conviction, following a guilty plea pursuant to Fed.R.Crim.P. 11(a)(2), of possession methamphetamine with intent to distribute it and a related firearms offense.

Gordon challenges only the district court's denial of his pretrial motion to suppress evidence, contending that the search warrant used to obtain the evidence violated the particularity requirement of the Fourth Amendment. We affirm.

Facts and Proceedings Below

On September 16, 1988, an undercover police officer showed Drug Enforcement Administration (DEA) Agent Wayne Hoffman (Hoffman) a residence that the officer identified as one of the locations at which Gordon was believed to be manufacturing methamphetamine. The same undercover officer had been involved with Gordon in the manufacture of methamphetamine. Believing that the address of the residence was 18003 Tenth Street, in Magnolia Gardens Subdivision, Harris County, Texas, Hoffman on

September 22, 1988, appeared before a United States Magistrate and obtained a search warrant for premises at "18003 10th Street, Magnolia Gardens, Harris County, Texas."

Upon executing the warrant, Hoffman discovered a methamphetamine laboratory at the residence that the undercover officer had shown him. About a week or two later, when routinely examining tax records to determine the identity of the owner of the residence searched, Hoffman learned for the first time that the address contained in the search warrant did not exist.

Gordon testified at a suppression hearing that the residence's correct address was 18003 Riverside Drive in Riverglen Subdivision, Harris County. Apparently, Tenth Street is almost perpendicular to Riverside and is marked

with a dead end sign near the intersection of the two streets.[1] The street sign at the intersection reads only "10th St." Hoffman testified that the residence was located three blocks past the intersection after turning right and was marked with a sign that read "18003."

Hoffman further testified regarding the basis for his error. He explained that as he entered the area on Garrett Street, which eventually turns into Tenth Street, he saw a sign reading "Magnolia Gardens." Hoffman asserted that he did not see a sign indicating that Riverside was not a continuation of Tenth Street.

Hoffman was indicted on October 19, 1988, in the United States District Court

---

[1]As one approaches the intersection from Tenth Street, Riverside is to the right and what Hoffman explained appeared to be a little driveway is to the left. Tenth Street apparently curves into Riverside Drive.

for the Southern District of Texas, Houston Division, on four counts: distributing amphetamines on September 16, 1988, in violation of 21 U.S.C. Sections 841(a)(1) and 841(b)(1)(D) (count one); carrying a firearm during and in relation to the commission of a drug trafficking offense on September 16, 1988, in violation of 18 U.S.C. Section 924(c)(1) (count two); possessing methamphetamine with the intent to distribute it on September 23, 1988, in violation of Sections 21 U.S.C. 841(a)(1) and 841(b)(1)(C) (count three); and carrying a firearm during and in relation to the commission of a drug trafficking offense on September 23, 1988, in violation of 18 U.S.C. Section 924 (count four). Gordon originally entered a plea of not guilty and filed numerous pretrial motions, including a motion to suppress

evidence seized from 18003 Riverside Drive. Following a hearing on the suppression issue, the court denied the motion in a written order and a jury was selected.

Gordon subsequently entered a plea bargain agreement with the government and pleaded guilty to the third and fourth counts in the indictment. His plea, pursuant to Fed.R.Crim.P. 11(a)(2), was conditioned upon appellate review of the court's suppression ruling.[2] The court sentenced Gordon to one hundred twenty-one months as to the third count and to sixty months as to the fourth count, the two sentences to be served consecutively. The court also imposed two consecutive

---

[2]Gordon moved for a mistrial as to the remaining counts, the government moved to dismiss those counts after Gordon waived any double jeopardy rights that could arise if the convictions were reversed on appeal, and the remaining counts were dismissed.

three-year terms of supervised release and assessed a special assessment of $100. This appeal followed.

Discussion

Gordon maintains on appeal that the district court erred by finding the search warrant to be valid and consequently not suppressing the evidence seized in the search of the Riverside residence, contending that the warrant used violated the particularity clause of the Fourth Amendment because it contained the wrong address. We need not reach this issue, however, because the evidence is admissible under the good faith exception to the exclusionary rule of United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). See 2 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment 207 (1987) (Because of Leon, "whether the

description in the warrant in fact was constitutionally adequate is no longer determinative on the suppression issue.") (emphasis in original).

The Leon Court ruled that suppression "cannot logically contribute to the deterrence of Fourth Amendment violations" if an officer acted in objectively reasonable belief that the warrant had been properly issued. Leon, 104 S.Ct. at 3418-19 (footnote omitted). However, as one exception to that rule, the Court stated: "depending on the circumstances of the particular case, a warrant may be so facially deficient--i.e., in failing to particularize the place to be searched or the things to be seized--that the executing officers cannot reasonably presume it to be valid." Id. at 3421 (citation omitted).

Here, one who looked simply at the

warrant, or at both the warrant and the supporting affidavit, would not suspect that it was invalid; any defect would appear only if one knew that Tenth Street did not have an "18003" address. It is obvious that such was not common knowledge throughout Harris County. The asserted defect in the warrant was not facial in the sense used in Leon.

To rule in these circumstances that this warrant was "so facially deficient" that its executing officers could not "reasonably presume it to be valid," would egregiously elevate form over substance. Hoffman had sufficient probable cause to search Gordon's residence and was able to obtain a warrant from a magistrate. Further, Hoffman searched only the location intended to be searched--the residence he had seen with the undercover officer

on September 16, 1988.[3] Because Hoffman was both the affiant and the executing officer and had recently viewed the location in question, "there was no possibility the wrong premises would be searched." United States v. Burke, 784 F.2d 1090, 1093 (11th Cir.), cert. denied, 476 U.S. 1174, 106 S.Ct. 2901, 90 L.Ed.2d 987 (1986).

In Burke, supra, the Eleventh Circuit upheld the validity of a warrant even though it contained an incorrect address because, among other things, the affiant accompanied the executing officers on the search and was able to point out the proper location: Burke, 784 F.2d at 1903; accord United States v. Gahagan, 865 F.2d 1490 (6th Cir. 1989); United

---

[3]We note that the erroneous address contained in the warrant did not actually exist. Consequently, there was no possibility that the wrongly-noted location could have been searched.

States v. Turner, 770 F.2d 1508 (9th Cir. 1985); United States v. Clement, 747 F.2d 460 (8th Cir. 1984). Here, despite the error in description, Hoffman "could still ascertain with reasonable effort the place intended" to be searched. 2 W. LaFave, supra, at 215 n. 34.

Under the circumstances of this case, we cannot conclude, as Gordon argues, that the good faith exception to the exclusionary rule is inapplicable. United States v. Mahoney, 712 F.2d 956, 960-62 (5th Cir. 1983). Hoffman entertained the objectively reasonable belief that the warrant had been properly issued and that it comported with the Fourth Amendment. Nothing indicates that Hoffman acted in bad faith. See 2 W. LaFave, supra, at 214-15. It obviously could not serve any law enforcement, or other, purpose to intentionally state a

nonexistent address on a warrant plainly intended to be executed at the specific place it was executed and for which there was probable cause to search. Any Fourth Amendment violation here was purely technical in terms of the interests that the amendment was designed to protect. As excluding the evidence here would not serve as a meaningful deterrent to future Fourth Amendment violations, and any marginal increment in deterrence that application of the rule would achieve is outweighed by the societal costs of suppression, we rule that the district court correctly denied Gordon's motion to suppress. Mahoney, 712 F.2d at 962.

Gordon also seeks a remand to present evidence demonstrating that one who was unfamiliar with the subject location would not be able to find it with the warrant in question. Given the preceding

authority, such an inquiry is unnecessary since Hoffman was both the affiant and the executing officer. Consequently, a remand is not called for.

Conclusion

For the foregoing reasons, the order of the district court denying Gordon's suppression motion is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2889

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RICKY W. GORDON,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(June 4, 1990)

Before POLITZ, GARWOOD and JOLLY, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

VS.

RICKY WAYNE GORDON,
Defendant.

ORDER

On Wednesday, April 26, 1989, the Court held a hearing on Defendant Ricky Wayne Gordon's Motion to Suppress Evidence. Defendant was arrested and evidence was seized at 18003 Riverside, Harris County, Texas on September 23, 1988. The warrant which authorized the search of this house bore the address "18003 10th Street, Magnolia Gardens, Harris County, Texas." Defendant argues that the incorrect address invalidates the warrant. Furthermore, Defendant contends that he was not provided with a copy of the search warrant or of the inventory list

of the items seized. The Government in its response first argues that Defendant does not have standing to contest the warrant, and second, that the mistaken address is not a sufficient basis upon which to invalidate the warrant.

After considering the evidence presented at the hearing, the Court makes the following findings regarding the issue of standing. Defendant has a permanent residence in Fort Worth, Texas. At the time of his arrest, Defendant leased the house at 18003 10th Street, Harris County, Texas. The interior of the house on 10th Street was not visible to the public. Defendant kept personal belongings at 18003 10th Street. Based on these facts, the Court finds that Defendant resided at 18003 10th Street and had a reasonable expectation of privacy at that residence. Therefore,

Defendant has standing to contest the validity of the search warrant.

Counsel for Defendant argues that the wrong address on the face of the warrant constituted a fatal flaw and caused the warrant to be issued without probable cause. Counsel proposed that an affiant may not rehabilitate a search warrant by giving additional information to substantiate the warrant after the warrant was issued and the search conducted. In support of that proposition, counsel offered several cases for the Court's consideration. A review of those cases leads the Court to conclude that probable cause for a search warrant cannot be rehabilitated after the fact. The Court agrees with counsel for Defendant that an inadequate showing of probable cause to the magistrate may not be "rescued by post-search testimony on

information known to the searching officer at the time of the search." See Rice v. Wolff, 513 F.2d 1280 (8th Cir. 1974). However, counsel misconstrues this holding in relation to the present case. The search warrant in question is sufficient, on its fact, to show probable cause. The polemical issue at present is whether the particular place to be searched as listed on the warrant was inadequate because it was the wrong address and because the residence was not otherwise described. This Court holds that the technical error in the description of the place to be searched did not render the search warrant invalid in light of the fact that the executing officer personally knew the location of the residence intended to be searched and, in fact, the intended place was indeed searched. The test for

determining the sufficiency of the search warrant is whether the place to be searched is described with sufficient particularity to enable the executing officer to locate and identify the premises with reasonable effort and whether there is any reasonable probability that another premise might be mistakenly searched. U.S. v. Alvarello, 592 F.2d 1339 (5th Cir. 1979); U.S. v. Delozier, 644 F.Supp. 135 (E.D. Tex. 1986); see also U.S. Const. Amend. 4; Fed. R. Crim. P. 41. As the Court stated in Delozier, "[i]n applying this test, this Court is aware that a search warrant must be tested and interpreted in a common sense and realistic manner, rather than a hypertechnical one. Thus, an error in the description of the place to be searched does not automatically render a search warrant invalid." Id. at 137.

In the case at bar, the address on the face of the warrant was reasonable for the executing officer to infer. The agents applying for the warrant personally knew which premises was to be searched and had previously been to that residence. No signs existed indicating that 10th Street had changed to Riverside. The only indication of a street name at the junction of 10th Street and what is now known to be Riverside was a single sign stating "10th Street." Traveling in the direction in which the executing officers approached the residence, it was reasonable to assume that they were still on 10th Street. Based upon the application of the law to these facts, the Court views the technical error in the address on the warrant as insufficient to cause the warrant to be invalid.

Additionally, the Court finds that Defendant was arrested immediately after the officers entered the residence. The search was conducted after the officers escorted Defendant away from the premises. Therefore, a copy of the search warrant and the inventory list was left at the residence. The Court finds that this was reasonable and satisfactory under the existing circumstances.

Accordingly, the Court hereby ORDERS that Defendant's Motion to Suppress Evidence is DENIED.

After reviewing all of the other motions pending in this case, the Court hereby ORDERS the following:

1. Defendant's Motion to Prohibit Prior Jury Service is GRANTED:
2. Defendant's Motion for Inspection of Jury List is DENIED;

3. Defendant's Motions for Interrogation of Prospective Jurors and for Permission to Examine Prospective Jurors are GRANTED; Venire questioning will be done in accordance with the Court's usual procedures.
4. Defendant's Motion to List Government Witnesses is DENIED. The Government will provide that list at the commencement of trial.
5. Defendant's Motion to File Additional Motions is GRANTED.
6. Defendant's Motion to Require Disclosure of Confidential Informant's Identity is RESOLVED.
7. Defendant's Motion to Require Disclosure of Relationship between the Government and its Witness is GRANTED.

8. Defendant's Motion to Dismiss is DENIED.

9. Defendant's Motion to Examine Evidence Previously Tested by State is RESOLVED.

10. Defendant's Motion for Disclosure of Electronic Surveillance is RESOLVED.

11. Defendant's Motion in Limine is GRANTED.

12. Defendant's Motion for Discovery and Inspection and Demand for Exculpatory Evidence is to be RESOLVED in accordance with the federal rules.

13. Defendant's Motion for Early Disclosure of Jencks Act material is DENIED. Jencks Act material will be disclosed at trial.

14. Defendant's Motion to Compel Disclosure of U.S. Attorney's Jury Selection Data is RESOLVED.

15. Defendant's Motion to Suppress Audio Tapes is RESOLVED.

SIGNED this 2nd day of May, 1989.

/s/Kenneth M. Hoyt
United States District Judge

Supreme Court, U.S.
FILED
NOV 5
JOSEPH F. SPANIOL, JR.

(2)

No. 90-376

In the Supreme Court of the United States

OCTOBER TERM, 1990

RICKY WAYNE GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

THOMAS M. GANNON
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether, in the circumstances of this case, a law enforcement officer's reliance on a search warrant that erroneously stated the address of the place to be searched was objectively reasonable within the meaning of *United States* v. *Leon*, 468 U.S. 897 (1984).

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Andresen v. *Maryland*, 427 U.S. 463 (1976)	6
Brinegar v. *United States*, 338 U.S. 160 (1949)	8
Hill v. *California*, 401 U.S. 797 (1971)	8
Illinois v. *Rodriguez*, 110 S. Ct. 2793 (1990)	8
Maryland v. *Garrison*, 480 U.S. 79 (1987)	6, 7, 8
Massachusetts v. *Sheppard*, 468 U.S. 981 (1984)	8
State v. *Parmar*, 231 Neb. 687, 437 N.W.2d 503 1989)	9, 10
Steele v. *United States*, 267 U.S. 498 (1925)	6, 7
United States v. *Burke*, 784 F.2d 1090 (11th Cir.), cert. denied, 476 U.S. 1174 (1986)	7, 8
United States v. *Campanile*, 516 F.2d 288 (2d Cir. 1975)	9
United States v. *Clement*, 747 F.2d 460 (8th Cir. 1984)	9
United States v. *Gahagan*, 865 F.2d 1490 (6th Cir.), cert. denied, 109 S. Ct. 3242 (1989)	6, 7, 8, 9
United States v. *Hove*, 848 F.2d 137 (9th Cir. 1988)	9
United States v. *Leon*, 468 U.S. 897 (1984)	4, 5, 8, 9
United States v. *Owens*, 843 F.2d 462 (4th Cir. 1988)	8
United States v. *Ridinger*, 805 F.2d 818 (8th Cir. 1986)	6
United States v. *Turner*, 770 F.2d 1508 (9th Cir. 1985), cert. denied, 475 U.S. 1026 (1986)	8
United States v. *Weinstein*, 762 F.2d 1522 (11th Cir. 1985), cert. denied, 475 U.S. 1110 (1986)	8-9

Statutes: Page

U.S. Const. Amend. IV 4, 5, 6, 7, 8, 10
18 U.S.C. 924(c)(1) 2
21 U.S.C. 841(a)(1) 2

Miscellaneous:

2 W. LaFave, *Search and Seizure* (2d ed. 1987) 7, 9, 11

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-376

RICKY WAYNE GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 901 F.2d 48. The order of the district court (Pet. App. C1-C10) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 1990, and a petition for rehearing was denied on June 4, 1990. Pet. App. B1. The petition for a writ of certiorari was filed on August 31, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a plea of guilty in the United States District Court for the Southern District of Texas, peti-

tioner was convicted of possessing methamphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 3), and of using a firearm in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1) (Count 4). He was sentenced to a term of 121 months' imprisonment on Count 3 and to a consecutive term of 60 months' imprisonment on Count 4, to be followed by a three-year term of special parole. The district court also imposed special assessments of $100. R.E. 9.[1] The court of appeals affirmed. Pet. App. A1-A13.

1. On September 16, 1988, Drug Enforcement Administration Special Agent Wayne A. Hoffman was shown a residence in Harris County, Texas, that a police undercover officer had identified as a location where petitioner was believed to be manufacturing methamphetamine. Agent Hoffman believed the address of the residence was 18003 10th Street in the Magnolia Gardens subdivision. Accordingly, when he sought a search warrant from a federal magistrate to search the residence, he identified the premises by that address. Agent Hoffman's supporting affidavit stated that the undercover police officer had informed him: (1) that petitioner previously had taken the undercover officer to the residence and told the officer that it was the location of one of his clandestine amphetamine laboratories; (2) that the undercover officer observed glassware and chemicals used for the manufacture of amphetamine at the residence; (3)

---

[1] "R.E." refers to the Appellant's Record Excerpts filed by petitioner in the court of appeals. Petitioner's guilty plea reserved his right to seek appellate review of the district court's denial of his suppression motion. Pet. App. A6. Following his guilty plea, the remaining two counts in the indictment were dismissed.

that petitioner gave the officer a sample of the manufactured drug; and (4) that petitioner expressed his intention to manufacture additional amounts of amphetamines. Pet. App. A2-A3; R.E. 18.

Agent Hoffman and other law enforcement officers then executed the warrant at the residence Hoffman had been shown by the undercover officer. During the search, the officers discovered a methamphetamine laboratory. Shortly thereafter, while reviewing relevant tax records to identify the owner of the premises, Agent Hoffman learned for the first time that the address on the search warrant, 18003 10th Street, did not exist and was not the correct address of petitioner's residence. Pet. App. A2-A3; R.E. 30-32.

2. Petitioner moved to suppress the evidence seized during the search. He argued that because of the mistaken recitation of the address of his residence, the warrant did not comply with the Fourth Amendment's requirement that a warrant shall "particularly describ[e] the place to be searched." At the suppression hearing, petitioner testified that the correct address of the residence was 18003 Riverside Drive in the Riverglen subdivision, and that the house was located three blocks from an intersection at which 10th Street reached a dead end at Riverside Drive. Agent Hoffman explained at the hearing why he believed that the residence he searched pursuant to the warrant was 18003 10th Street in Magnolia Gardens. Specifically, he testified that: (1) when he entered the vicinity on Garrett Street, which eventually became 10th Street, a sign said "Magnolia Gardens"; (2) the only street sign at the point where 10th Street intersected with Riverside Drive read "10th Street"; (3) at that intersection, the main road appeared to curve to the right at an angle of almost 90

degrees, while the road to the left appeared to be a small driveway; (4) a sign in front of the residence said "18003"; and (5) he thought he was still on 10th Street because of the "10th Street" sign and the absence of any other sign indicating that what turned out to be Riverside Drive was not a continuation of 10th Street. Agent Hoffman also said that he relied on the warrant to search 18003 Riverside Drive and that he would not have conducted the search if the magistrate had not approved the warrant. Pet. App. A3-A4; R.E. 30-34; Gov't C.A. Br. 5-6.

The district court denied petitioner's motion to suppress. Pet. App. C1-C10. It found that in light of the circumstances described by Agent Hoffman and the layout of the neighborhood, it was reasonable for Agent Hoffman to infer that the street on which the residence was located was 10th Street. *Id.* at C6. Because "the executing officer personally knew the location of the residence to be searched and, in fact, the intended place was indeed searched," the court concluded that "the technical error in the description of the place to be searched did not render the search warrant invalid." *Id.* at C4.

3. The court of appeals affirmed the denial of the suppression motion. Pet. App. A1-A13. The court found it unnecessary to reach the question whether the incorrect address actually rendered the search warrant invalid under the Fourth Amendment, because it concluded that the evidence seized during the search was in any event admissible under the good faith exception to the exclusionary rule, articulated by this Court in *United States* v. *Leon*, 468 U.S. 897 (1984). Pet. App. A7. The court observed that despite the erroneous address, the warrant was not "facially deficient" in the sense that would render the officers' reliance on it unreasonable. To find the

warrant facially deficient, the court held, "would egregiously elevate form over substance," because Agent Hoffman had probable cause to search petitioner's residence and intended to and did search only the residence he previously had seen with the undercover police officer. *Id.* at A8-A9. Finding that Agent Hoffman's belief in the validity of the warrant was therefore objectively reasonable, that nothing in the record suggested bad faith on his part, that in the circumstances any Fourth Amendment violation was "purely technical," and that "any marginal increase in deterrence that application of the [exclusionary] rule would achieve is outweighed by the societal costs of suppression," the court sustained the district court's denial of the suppression motion. *Id.* at A11-A12.

ARGUMENT

1. Petitioner first contends (Pet. 8-12) that the search warrant in the present case was "facially deficient" and that it therefore was not objectively reasonable, under *Leon*, for Agent Hoffman and those accompanying him to rely on the warrant as authorization for the search. This contention is without merit.

The Court held in *United States* v. *Leon*, 468 U.S. 897, 918 (1984), that "suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." Among several examples of such "unusual cases," the Court described the following situation (*id.* at 923):

> Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient—*i.e.*, in failing to particularize the place

> to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.

The search warrant in this case was not "facially deficient" in particularizing the place to be searched, so as to take this case outside the good-faith exception to the exclusionary rule.

The purpose of the Fourth Amendment's particularity requirement is to prevent general searches. *Maryland* v. *Garrison*, 480 U.S. 79, 84 (1987). "By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Ibid.*; see also *Andresen* v. *Maryland*, 427 U.S. 463, 480 (1976). It also serves to exclude other locations as the possible subjects of the search. See *United States* v. *Gahagan*, 865 F.2d 1490, 1496 (6th Cir.), cert. denied, 109 S. Ct. 3242 (1989); *United States* v. *Ridinger*, 805 F.2d 818, 819 (8th Cir. 1986). The particularity requirement is applied in a common-sense manner. "It is enough if the description is such that the officer with a search warrant can, with reasonable effort, ascertain and identify the place intended." *Steele* v. *United States*, 267 U.S. 498, 503 (1925).

The warrant in this case clearly satisfied the foregoing principles. It authorized the search of "the premises known as * * * 18003 10th Street, Magnolia Gardens, Harris County, Texas." R.E. 14.[2]

---

[2] The warrant also specified with particularity the contraband and other evidence and fruits of petitioner's drug-manufacturing enterprise to be seized. R.E. 14.

There is no reason to believe that this description was inherently inadequate to identify the premises to be searched.[3] It is common practice for a warrant to use a street address for this purpose. See, *e.g.*, *Steele* v. *United States*, 267 U.S. at 503; 2 W. LaFave, *Search and Seizure* § 4.5(a), at 208 (2d ed. 1987). In this case, even though the address was not technically correct, it identified the residence with sufficient particularity to enable an officer to "ascertain and identify the place intended" to be searched. See *United States* v. *Gahagan*, 865 F.2d at 1496-1499; *United States* v. *Burke*, 784 F.2d 1090, 1092-1093 (11th Cir.), cert. denied, 476 U.S. 1174 (1986); cf. *Steele* v. *United States*, 267 U.S. at 503.

Moreover, as the district court held, Pet. App. C6, Agent Hoffman's failure to appreciate his mistake about the address of the residence at the time he applied for and executed the warrant was reasonable under the circumstances, in light of the configuration of the streets and the absence of signs that would have alerted Agent Hoffman to the correct address. Accordingly, when the situation is judged, as it must be, on the basis of the information known to Agent Hoffman and the other officers, see *Maryland* v. *Garrison*, 480 U.S. at 84-85, it is clear that their conduct was reasonable. Thus, contrary to petitioner's contention (Pet. 8-12), the decision below neither misapplies *Leon* nor undermines the particularity requirement of the Fourth Amendment. Quite apart

---

[3] Moreover, the supporting affidavit stated that the affiant, Agent Hoffman, had been shown the premises by the undercover police officer, thereby demonstrating that he personally knew which residence was to be searched.

from the good-faith exception to the exclusionary rule articulated in *Leon*, the Court has consistently refused to suppress evidence when officers conducting a search act on the basis of a reasonable, but erroneous, belief as to the facts. See *Illinois* v. *Rodriguez*, 110 S. Ct. 2793, 2799-2801 (1990); *Maryland* v. *Garrison*, 480 U.S. at 85, 87-88; *Hill* v. *California*, 401 U.S. 797, 803-804 (1971); *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949).

2. Petitioner contends (Pet. 12-17) that because the court of appeals' finding that Agent Hoffman's reliance on the search warrant was objectively reasonable was based in part on information known to Agent Hoffman but not to the magistrate who issued the warrant, that finding is in conflict with decisions of the Ninth Circuit and of the Supreme Court of Nebraska.

Leon specifically contemplates that courts will consider "all of the circumstances" in determining whether a police officer's reliance on a search warrant is objectively reasonable. 468 U.S. at 922 n.23; see also *Massachusetts* v. *Sheppard*, 468 U.S. 981, 989-990 & n.6 (1984). The court of appeals therefore properly took Agent Hoffman's personal knowledge of the place to be searched into account when it ruled that his reliance on the search warrant was reasonable even though, unbeknownst to him, the warrant contained an erroneous address for the place to be searched. Other courts have reached similar conclusions in analogous Fourth Amendment contexts. See *United States* v. *Gahagan*, 865 F.2d at 1497-1498; *United States* v. *Owens*, 848 F.2d 462, 465-466 (4th Cir. 1988); *United States* v. *Burke*, 784 F.2d at 1092-1093; *United States* v. *Turner*, 770 F.2d 1508, 1511 (9th Cir. 1985), cert. denied, 475 U.S. 1026 (1986); *United States* v. *Weinstein*, 762 F.2d 1522,

1532-1533 (11th Cir. 1985), cert. denied, 475 U.S. 1110 (1986); *United States* v. *Clement*, 747 F.2d 460, 461 (8th Cir. 1984); *United States* v. *Campanile*, 516 F.2d 288, 291 (2d Cir. 1975); see also 2 W. LaFave, *supra*, § 4.5(a), at 214-215 (approving consideration of facts known to affiant where there is reason to believe that erroneous statement in description of premises was made in good faith effort to provide complete description).[4]

Despite petitioner's assertions, neither *United States* v. *Hove*, 848 F.2d 137 (9th Cir. 1988), nor *State* v. *Parmar*, 231 Neb. 687, 437 N.W.2d 503 (1989), holds to the contrary. Both cases involved the quite different situation of the complete failure of the affidavit supporting the search warrant to state probable cause. In each case the court held that the search warrant and supporting affidavit, on their face, precluded reasonable reliance. And in each case the court relied not on the discussion in *Leon* of a warrant that was facially deficient in particularizing the place to be searched, but rather on the discussion of a warrant based on an affidavit that, on its face, was "so lacking in indicia of probable cause to render official belief in its existenec entirely unreasonable." 468 U.S. at 923. See *Hove*, 848 F.2d at 140; *Parmar*, 231 Neb. at 698, 437 N.W.2d at 510 (quoting *Hove*). In the present case, by contrast, petitioner does not dispute the existence of probable cause (much less argue that the supporting affidavit was so lacking in indicia of probable cause as to preclude reasonable

---

[4] Because Agent Hoffman personally knew which premises were to be searched and because the erroneous address in the warrant did not actually exist, there was no possibility that another residence could have been searched in reliance on the warrant. Pet. App. A10 n.3; see *United States* v. *Gahagan*, 865 F.2d at 1498.

reliance), and the court of appeals specifically found that the warrant and supporting affidavit were not "facially deficient" and that Agent Hoffman's reliance on them was objectively reasonable. Pet. App. A9, A11.

In *Hove*, because of a stenographer's error, the affidavit supporting the search warrant did not link either the suspect or any criminal activity with the place to be searched. 848 F.2d at 139-140. In the court's view, the resulting absence of "any indicia of probable cause" rendered the officer's belief in the existence of probable cause objectively unreasonable, a deficiency that could not be cured by the subsequent testimony of a police officer about facts that might have established probable cause if they had appeared in the supporting affidavit. *Id.* at 140. In *Parmar*, although the supporting affidavit identified a BB gun as an item to be seized pursuant to the warrant, it failed to explain the gun's relevance to the investigation or the factual basis for its seizure. On these facts, the court reached a conclusion similar to that of the Ninth Circuit in *Hove*. 231 Neb. at 692, 695, 437 N.W.2d at 507, 509.[5] There is a clear difference between the complete failure of affidavits to state the core Fourth Amendment element of probable cause and the "purely technical" Fourth Amendment violation that might have occurred here, despite the facial validity of the warrant.[6] Accordingly, both *Hove* and *Parmar* are readily distinguishable.

---

[5] The court nevertheless affirmed the defendant's conviction, holding that admission of the BB gun into evidence was harmless beyond a reasonable doubt. 231 Neb. at 701, 437 N.W.2d at 512.

[6] As noted above (see page 4, *supra*), because the court of appeals concluded that the evidence seized was admissible

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

THOMAS M. GANNON
Attorney

NOVEMBER 1990

---

under *Leon*, it did not reach the question whether the search violated the Fourth Amendment. See 2 W. LaFave, *supra*, § 4.5(a), at 212-215 & n.33 (discussing cases, including *Burke*, *Turner* and *Clement*, that found no Fourth Amendment violation where there was an error in the description of the premises to be searched); see also Pet. App. A10-A11 (same).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 282061 20179